

The Shopfront

YOUTH LEGAL CENTRE

Mental health and the law

1 Introduction

The *Mental Health Act 2007* sets out detailed procedures for dealing with people with mental illness in the hospital system and the community. This document summarises some of these procedures, including hospital admissions and community treatment orders.

This document also deals with other laws covering decision-making for people who are unable to manage their own affairs due to mental illness or disability.

The *Mental Health (Forensic Provisions) Act 1990* provides a scheme for dealing with people with mental illnesses and intellectual disabilities in the criminal justice system. See separate document on **Mental Health and Intellectual Disability – Criminal Proceedings in Local and Children’s Courts** for further information.

2 Definitions

The *Mental Health Act* defines “**mental illness**”, “**mentally ill person**”, and “**mentally disordered person**”. These definitions are significant because they affect who can be involuntarily hospitalised and treated under the Act.

2.1 Mental illness

Section 4 of the *Mental Health Act* defines “**mental illness**” as:

A condition which seriously impairs, either temporarily or permanently, the mental functioning of a person and is characterised by the presence in the person of any one or more of the following symptoms:

- (a) delusions,
- (b) hallucinations,
- (c) serious disorder of thought form,
- (d) a severe disturbance of mood,
- (e) sustained or repeated irrational behaviour indicating the presence of any one or more of the symptoms referred to in paragraphs (a)-(d).”

2.2 Mentally ill person

Confusingly, a person with a mental illness is not always a “**mentally ill person**”! According to section 14 of the *Mental Health Act*:

“A person is a mentally ill person if the person is suffering from a mental illness, and, owing to that illness, there are reasonable grounds for believing that care, treatment or control of the person is necessary:

- (a) for the person’s own protection from serious harm, or

- (b) for the protection of others from serious harm.

In considering whether a person is a mentally ill person, the continuing condition of the person, including any likely deterioration of the person's condition and the likely effects of any such deterioration, are to be taken into account."

2.3 Mentally disordered person

According to section 15 of the *Mental Health Act*:

"A person (whether or not the person is suffering from mental illness) is a mentally disordered person if the person's behaviour for the time being is so irrational as to justify a conclusion on reasonable grounds that temporary care, treatment or control of the person is necessary:

- (a) for the person's own protection from serious physical harm, or
(b) for the protection of others from serious physical harm."

A person who is suicidal would often be defined as a "mentally disordered person".

3 Involuntary admission to hospital

3.1 How involuntary admission takes place

A "mentally ill person" or "mentally disordered person" can be involuntarily admitted to a "mental health facility". This is often referred to as being "scheduled".

Involuntary admission can come about in a number of ways (set out in sections 18 – 26 of the *Mental Health Act*) including:

- a mental health certificate given by a medical practitioner or accredited person;
- being brought to the facility by an ambulance officer;
- being apprehended by a police officer;
- an order for an examination or observation by a medical practitioner or accredited person;
- on the order of a Magistrate or bail officer;
- a transfer from another health facility; or
- on a written request made to the authorised medical officer by a primary carer, relative or friend of the person.

A police officer may enter premises and take a person by force if authorised to do so by a doctor or magistrate.

3.2 Notification of primary carer

The person's **primary carer** must be notified within 24 hours of the person being involuntarily detained (*Mental Health Act*, section 75).

A person's primary carer is the person's guardian (if one has been appointed) or a parent (if the person is under 18). If neither of the above is appropriate, the patient is entitled to nominate a person. If no nomination is made, then the primary carer is a spouse (if the relationship is close and continuing) or any person who is primarily responsible for providing support or care to the patient (*Mental Health Act*, sections 71-72).

3.3 Medical examination

Once a person (the “**assessable person**”) has been involuntarily admitted, they must be examined by an **authorised medical officer (AMO)** within 12 hours.

If the doctor is of the opinion that the person is **not** a “mentally ill person” or a “mentally disordered person”, they must be released.

Otherwise, a second examiner (who must be a psychiatrist if the first examiner was not) must assess the person as soon as practicable after the initial examination.

If the second examiner is of the opinion that the person is not a “mentally ill person” or a “mentally disordered person”, the AMO must have the person examined again by a third examiner, who must be a psychiatrist.

If the third examiner is of the opinion that the person is not a “mentally ill person” or a “mentally disordered person”, they must be released immediately.

(Mental Health Act, section 27).

3.4 Mentally disordered persons

If the person is assessed as being a “**mentally disordered person**” by the initial AMO and one other examiner, the person can be detained as a mentally disordered person but only on limited terms.

The person must be examined at least every 24 hours and must not be kept there for longer than 3 working days (unless, of course, he or she is found to be a “mentally ill person” during this time).

A person may not be admitted and detained as a mentally disordered person more than 3 times in one calendar month.

(Mental Health Act, section 31).

3.5 Mentally ill persons

If the AMO and either the second or third examiner assesses the person to be a “**mentally ill person**”, the person must be brought before a **magistrate** for a **mental health inquiry**.

The assessable person must be notified by an AMO that a mental health inquiry will be held, and all reasonable steps must be taken to notify the person’s primary carer.

The hearing usually takes place at the hospital before a visiting magistrate. The magistrate may consider reports and recommendations of the AMO or any other information placed before them. They must also give regard to any evidence given at the inquiry by an expert witness concerning the person’s cultural background and its relevance to any questions of mental illness.

The patient has a right to legal representation at the inquiry, which will usually be provided by Legal Aid’s Mental Health Advocacy Service.

If the magistrate finds that the person is a “mentally ill person”, the magistrate may order that the person be:

- (a) **discharged** into the care of a person’s primary carer;
- (b) placed on a **community treatment order**; or
- (c) kept in a specified mental health facility as an **involuntary patient** for up to 3 months.

If a magistrate is **not** satisfied, on the balance of probabilities, that the person is a “mentally ill person”, the person must be discharged. However, the magistrate may defer the discharge for up to 14 days if it is in the best interests of the person to do so.

(Mental Health Act, sections 34-35)

3.6 Continuing detention in mental health facility

If a person is detained as an involuntary patient, and it appears that they are not well enough to be discharged towards the end of the temporary order, they must go before the **Mental Health Review Tribunal**.

If the Tribunal determines that the person must be detained for further observation or treatment, the Tribunal must review the person’s case at least every 3 months for the first 12 months, and then at least every 6 months.

As well as reviews by the Tribunal, an involuntary patient must be medically examined by an AMO at least every 3 months, to determine whether their continued detention is necessary.

(Mental Health Act, sections 37-39)

3.7 Reclassification as a voluntary patient

A person who is detained in a mental health facility may be reclassified as a **voluntary patient** at any time before a mental health inquiry, but only if the AMO is of the opinion that the person is likely to benefit from care or treatment as a voluntary patient, and only with the person’s consent (*Mental Health Act, sections 30, 40*).

3.8 Complaints

A person who is dissatisfied with the way he or she has been treated in a mental hospital may complain to an **Official Visitor**. Official Visitors are appointed by the Minister for Health and can investigate, negotiate and make recommendations about complaints.

A person may also complain to the **Health Care Complaints Commission**.

4 Involuntary treatments

4.1 General

Generally, an authorised medical officer may give or authorise the giving of “any treatment (including any medication) the officer thinks fit” to treat an involuntary patient or an assessable person detained in a mental health facility (*Mental Health Act, section 84*).

A medical practitioner must not administer medication in a dosage that “having regard to professional standards, is excessive or inappropriate” (*Mental Health Act, section 85* (see also s29)).

4.2 Electro-convulsive therapy (ECT)

Electro-convulsive therapy (ECT) may be administered to an involuntary patient only with an order from the a Mental Health Review Tribunal. An authorised medical officer may apply to the Tribunal for consent to administer ECT to an involuntary patient if at least two medical practitioners (one of whom is a psychiatrist) provide a written certificate (*Mental Health Act, section 94*).

4.3 Prohibited treatments

The following treatments are prohibited:

- (a) deep sleep therapy;
- (b) insulin coma therapy;
- (c) psychosurgery.

(*Mental Health Act*, section 83)

5 Community treatment orders

5.1 What is a community treatment order?

A community treatment order (CTO) allows a person to receive compulsory treatment while living in the community.

5.2 How a CTO is made

A CTO may be made by a magistrate or the Mental Health Review Tribunal, for patients in a mental health facility as well as non-patients in the community.

The Tribunal or Magistrate must first consider whether other care of a less restrictive kind is available and appropriate, and whether the person has a previous history of refusing to accept appropriate treatment.

A CTO cannot be made without a treatment plan being presented.

A magistrate or Tribunal may make a CTO in the absence of the person, as long as the person has received notice of the application for a CTO.

The magistrate or Tribunal may not make a CTO for longer than 12 months at a time. However, a CTO may be extended after an initial 12 months.

(*Mental Health Act*, sections 51 – 56).

5.3 Breach of a CTO

Non-compliance with the CTO may result in a written notice, known as a **breach order**, issued by the Director of Community Treatment. A breach order allows mental health staff members or police officers to take the affected person to a mental health facility (*Mental Health Act*, sections 58-59).

At the mental health facility, the person may be treated according to the CTO or reviewed for involuntary admission. Further refusal of treatment may lead to treatment and medication being administered by force against the person's will, and may also lead to detention at the mental health facility for the remaining term of the CTO.

Another review by a Tribunal may occur to assess the appropriateness of the CTO and whether other orders may be more suitable for the affected person (*Mental Health Act*, sections 60 – 64).

6 Guardianship, financial management and power of attorney

People who have mental illness, like those with intellectual disabilities, may sometimes be unable to manage their personal or financial affairs.

6.1 Guardianship

A **guardianship** order gives another person the power to make decisions on behalf of a person who is unable to manage his or her own affairs. This other person can be a relative, or someone from the **New South Wales Trustee and Guardian** (previously known as the Office of the Protective Commissioner).

This can cover matters such as medical treatment, accommodation and finances. Where possible, a temporary and limited order will be made rather than a permanent and all-encompassing one.

6.2 Financial management

A **financial management** order appoints a person to manage someone's financial affairs. The financial manager may be a nominated person such as a relative, or someone from the NSW Trustee and Guardian.

6.3 Power to make orders

Where appropriate, a **magistrate** or the **Mental Health Review Tribunal** may make an order that a mentally ill person's financial affairs be managed by the **New South Wales Trustee and Guardian** (*NSW Trustee and Guardian Act*, sections 43-52).

Otherwise, an application for a guardianship or financial management order may be made to the **Supreme Court** to the **Guardianship Tribunal** at any time (*Guardianship Act*, section 9). The application may be made by the person concerned or by someone on their behalf (with or without their consent).

6.4 Power of attorney

Anyone over the age of 18 who is capable of understanding may make a **power of attorney** which allows another person to conduct transactions on their behalf. A power of attorney can remain valid if the person loses capacity to manage his or her own affairs.

A power of attorney cannot give another person the power to make major life decisions, such as medical treatment. To achieve this, there must be a guardianship order.

6.5 Advance care directives

An adult over 18 years of age can make an **advance care directive** or "**living will**" specifying what they would like to happen, or who they would like to make decisions on their behalf, if they become incapable of making their own decisions.

In New South Wales, advance care directives must be respected by medical personnel if they are made by a capable adult, in clear and unambiguous terms, and extend to the situation at hand.

7 Criminal proceedings

There are special procedures for criminal matters involving people with a mental illness or intellectual disability. For further information, please see the separate document **Mental Health and Intellectual Disability – Criminal Proceedings in Local and Children's Courts**.

8 Contact details

8.1 Mental Health Advocacy Service

Level 4, 74-76 Burwood Road
Burwood NSW 2134

Phone: (02) 9745 4277

Fax: (02) 9744 6936

<http://www.legalaid.nsw.gov.au/asp/index.asp?pgid=514>

8.2 Mental Health Review Tribunal

PO Box 2019
Boronia Park
NSW 2111

Phone: (02) 9816 5955

Freecall: 1800 815 511

Fax: 02 9817 4543

Email: mhrt@doh.health.nsw.gov.au

<http://www.mhrt.nsw.gov.au/contacts.htm>

8.3 Guardianship Tribunal

Locked Bag 9
Balmain NSW 2041

Phone: (02) 9556 7600

Freecall: 1800 463928

Fax: 02 9555 9049

Email: gt@gt.nsw.gov.au

<http://www.gt.nsw.gov.au/>

8.4 New South Wales Trustee and Guardian

(Formerly the Office of the Protective Commissioner)

Locked Bag 5115
Parramatta NSW 2124

Phone: (02) 8688 2600

Freecall: 1300 360 466

Fax: (02) 8688 9783

<http://www.lawlink.nsw.gov.au/opc>

8.5 Official Visitors

Locked Bag 5016
Gladesville, NSW, 1675

Phone: (02) 8876 6301
Freecall: 1800 208 218
Fax: (02) 9817 3945
<http://www.ovmh.nsw.gov.au/>

8.6 Health Care Complaints Commission

Locked Mail Bag 18
Strawberry Hills NSW 2012

Phone: (02) 9219 7444
Freecall: 1800 043 159
Fax: (02) 9281 4585
Email: hccc@hccc.nsw.gov.au
<http://www.hccc.nsw.gov.au/Home/default.aspx>

Shopfront Youth Legal Centre Updated November 2009

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The Shopfront Youth Legal Centre is a service provided by Freehills, in association with Mission Australia and the Salvation Army.

This document was last updated in November 2009 and to the best of our knowledge is an accurate summary of the law in New South Wales at that time.

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